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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 109.

CHARLES E. SCHNEIDER AND CHARLES F. SCHNEIDER,
PLAINTIFFS IN ERROR,

vs.

HIRAM BARNEY, LATE COLLECTOR OF CUSTOMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 15, 1881.

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INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Capias	4	2
Declaration	6	2
Bill of particulars	10	3
Plea	12	4
Service of plea	13	5
Trial of cause	14	5
Verdict	14	5
Judgment	16	5
Bill of exceptions	18	6
Statement of evidence	18	6
Testimony of John T. Hogeboom	28	9
Thomas R. Rushmore	31	10
John T. Hogeboom	32	10
Plaintiff's requests	38	12
Charge of the court	46	15
Exceptions to charge	58	16
Assignment of errors	62	20
Joinder in error	65	20
Bond	67	21
Citation	69	22

JUDD & DETWEILER, PRINTERS, WASHINGTON.

plete transcript of the records and proceedings had in said court, in the case of Charles E. Schmieder and Charles F. Schmieder, plaintiffs in error, against Hiram Barney, late collector of customs, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this seventh day of October, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

4 *Capias.*

The President of the United States of America to the marshal of the southern district of New York, Greeting:

[L. S.] We command you that you take Hiram Barney, defendant, if he shall be found in your district, and him safely keep, so that you may have his body before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, to be held at the United States court buildings, No. 41 Chambers street, in the city of New York, in the said southern district, on the 29th of January inst., to answer unto Charles E. Schneider and C. F. Schneider, plaintiffs in a plea of trespass, and also to a certain bill of the said plaintiffs against the said defendant for the sum of fifteen thousand dollars, with interest, damages, demanded and received of the plaintiffs by the defendant, as collector of customs for the port and district of New York, under color of a law of the United States providing for the collection of duties on imports, according to the custom of the said court, before the said judge, then and there to be exhibited, and that you have then and there this writ.

5 Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New York, the 24th day of January, in the year one thousand eight hundred and sixty-six, and of the Independence of the United States the ninetieth.

A. W. GRISWOLD, *Pl'ffs' Attorney.*
KENNETH G. WHITE, *Clerk.*

[In. rev. stamp, 50 cts., cancelled.]

Endorsed: E. 467. U. S. circuit court for the southern district of New York. Charles E. Schneider *et al. vs.* Hiram Barney. *Capias* ret. Jan. 29, 1866. A. W. Griswold, pl'ffs' att'y.

6 U. S. Circuit Court.

CHAS. E. SCHNEIDER *et al. vs.* HIRAM BARNEY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court, and, by A. W. Griswold, their attorney, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on the 24th day of January, one thousand eight hundred and sixty-six, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of fifteen thousand dollars, lawful money of the United States of America, " demanded and received of the plaintiffs by the defendant, as collector of customs for the port and district of New York, under color of a law of the United States providing for the collection of duties on imports, and " (amendment by order of court, May 15, '72) for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant, and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and
7 at the request of the said defendant, and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of fifteen thousand dollars of lawful money as aforesaid. And being so found in arrear and indebted to
8 the said plaintiffs, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the same place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.,) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of said plaintiffs of fifteen thousand dollars, and thereof the plaintiffs bring suit, &c.

A. W. GRISWOLD,
Attorney for Plaintiffs.

9 Endorsed: E. 467. U. S. circuit court. Chs. E. Schneider *et al. vs.* Hiram Barney. Declaration. A. W. Griswold, pl'ffs' att'y.

Please take notice that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered

in the book of common rules, kept in the office of the clerk of this court, at the city of New York, requiring the within-named defendant to plead to said declaration in twenty days after service of a copy thereof and notice of said rule or judgment, on his attorney

A. W. GRISWOLD,
Pl'ffs' Att'y.

New York, Jan. 31, 1866.

Service of the above notice is admitted.

To D. J. DICKINSON, *Def't's Att'y.*

10 U. S. Circuit Court.

C. F. SCHNEIDER *et al. vs.* HIRAM BARNEY.

SIR: The particulars of the plaintiffs' claim in this action are as follows: For excess of duty paid under protest on merchandise imported in the following vessels:

Columbus	June, '63.	Germania	Sept., '63.
Orpheus	" "	New York	" "
Australia	July, "	Laura	" "
Astronom	" "	Bavaria	" "
Marco Polo	" "	Saxonia	Oct., "
Agnes	" "	Hammonia	" "
Hammonia	" "	New York	" "
Gothe	" "	Bremen	" "
Charlotte	Aug., "	Therese	Jan'y, '64.
Stella	" "	C. of Limerick	" "
Magnus	" "	America	Feb'y, "
Atlanta	" "	Taluco	" "
Neptune	" "	Dr. Barth	" "
Gans	" "	A. Deluris	" "
Stella	" "	C. of London	" "
Bremen	" "	Laura	" "
Saxonia	" "	Bremen	March, "
America	Sept., "	Republic	" "
Hammonia	" "	Hiawatha	" "
Hansa	" "	Ocean	" "

Yours, &c.,

ALMON W. GRISWOLD,
Att'y for Pl'ffs.

To D. S. DICKINSON, Esq., *Att'y for D'f't.*

11 Endorsed: E. 467. U. S. circuit court. C. F. Schneider *et al. vs.* Hiram Barney. Copy. Bill of Particulars. A. W. Griswold, pl'ffs' att'y. To D. S. Dickinson.

12 *Plea.*

United States Circuit Court, Southern District of New York.

HIRAM BARNEY *ads.* CHARLES E. SCHNEIDER *et al.*

And the said defendant, Hiram Barney, by D. S. Dickinson, his attorney, comes and defends the wrong and injury when, &c., and

says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

D. S. DICKINSON,
Defendant's Attorney.

To A. W. GRISWOLD, Esq., *Plaintiffs' Attorney.*

13 Endorsed: E. 467. U. S. circuit court. Hiram Barney *ads.* Charles E. Schneider *et al.* Plea. D. S. Dickinson, attorney for defendant.

Due service of a copy of within is hereby admitted.
New York, Feb. 10, 1866.

A. W. GRISWOLD.

You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.
New York, Feb. 10, 1866.
Yours, &c.,

D. S. DICKINSON,
Defendant's Attorney.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the 25th day of November, in the year of our Lord one thousand eight hundred and seventy-nine.

Present: The Honorable Nathaniel Shipman, judge.

CHARLES F. SCHNEIDER *et al.*
vs.
HIRAM BARNEY. } O. S. 3015.

This case being still on trial, the jurors sworn in it are all called and severally answer to their names; charge by the court to the jury having been reserved until this day, charge is given by the court to the jury, who retire in charge of an officer duly qualified to attend them, and, on their return, say that they find a verdict for the defendant, and so say they all; on motion of Mr. Griswold,
15 ordered that the plaintiff have thirty days' stay of proceedings within which to prepare and serve a bill of exceptions herein.

A copy.
H. H. M.

JOSEPH M. DEUEL, *Clerk.*

16 *Judgement.*

United States Circuit Court, Southern District of New York.

CHARLES E. SCHNEIDER & C. F. SCHNEIDER *vs.* HIRAM BARNEY.

The issues in this action having been brought on for trial before

Mr. Judge Shipman and a jury, at a circuit court of the October term, 1879, and the issues having been tried, and a verdict for the defendant having been duly rendered on the twenty-fifth day of November, 1879, and his costs having been adjusted at $217.91:

Now, on motion of Stewart L. Woodford, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $217.91, his taxed costs, and have execution therefor.

Judgment signed this 6th day of April, 1881.

JOHN A. SHIELDS,
Dep'ty Clerk.

17 Endorsed: O. S. 3,015. United States circuit court. Charles E. Schneider & ano. *vs.* Hiram Barney. Judgement roll. Stewart L. Woodford, United States attorney, att'y for def't. Costs, 217\frac{91}{100}$. U. S. circuit court. Filed Apr. 6, 1881. Joseph M. Deuel, clerk.

18 *Plaintiffs' Case and Exceptions.*

U. S. Circuit Court, Southern District of New York.

CHARLES F. SCHMIEDER and CHARLES E. SCHMIEDER
vs.
HIRAM BARNEY.

This was an action for money had and received, brought by the plaintiffs, merchants of New York, against the defendant, the collector of customs for the port of New York, to recover certain alleged excess of duties exacted of and paid by the plaintiffs, under protest in writing, duly made and signed, on importations of Saxony woven dress goods, over and above the rate of 35 per centum ad valorem, being for the difference between 35 per centum ad valorem and 30 per centum ad valorem and 2 cents per square yard, exacted
19 by the defendant, and claimed by him to be the legal rate of duty under the tariff act of March 2nd, 1861, and by section 9 of the act of July 14th, 1862, which imposed additional duties on the goods in question, and alleged by the plaintiffs to have been illegally exacted of them by the defendant, in his capacity as collector, as aforesaid, in the manner and under the circumstances hereinafter stated.

Upon the trial of said cause before the court, presided over by Hon. Nathaniel Shipman, judge, and a jury duly impanneled for the purpose, after issue joined, it appeared in evidence, among other things, that the plaintiffs were importers of goods known as Saxony woven dress goods, and specifically designated by various names, as Poil de Chévres, Valencias, Saxony plaids, German poplins, &c., which were manufactures of worsted or of worsted and cotton.

That the goods in question were imported into this port by
20 the plaintiffs at various times between the 24th day of June, 1863, and the 24th day of March, 1864, and entered at the custom-house as manufactures of worsted or of worsted and cotton,

at 35 per centum ad valorem, and that the defendant, as collector of the port of New York, exacted from the plaintiffs a duty thereon at the rate of 30 per centum ad valorem and 2 cents per square yard, claiming that said goods were of "similar description to delaines, muslin delaines, cashmere delaines, and barége delaines, composed wholly or in part of worsted, not exceeding in value 40 cents per square yard.

That the plaintiffs, in order to obtain possession of their goods, paid the excess of duty exacted, and duly protested in writing against the payment, claiming that said goods were not "delaines, cashmere delaines, muslin delaines, or barége delaines, or goods of a similar description," within the meaning of the said acts of Congress of 1861 and 1862, but were "manufactures of worsted, or of
21 which worsted was a component material, not otherwise provided for," and were dutiable under the last clause of the 13th section of the act of March 2d, 1861, at 30 per cent. ad valorem, and under the corresponding clause of the 9th section of the act of July 14th, 1862, to an addition of 5 per cent. ad valorem more, making 35 per cent. ad valorem. Or, they were "manufactures composed of mixed materials, in part of cotton, silk, wool or worsted, hemp, jute or flax," and dutiable at 30 per cent. under the 22d section of the act of 1861, and to 5 per cent. additional under the corresponding clause in the 13th section of the act of July 14th, 1862, making 35 per cent. duty ad valorem.

The evidence on both sides showed that "delaines, cashmere delaines, muslin delaines, and barége delaines" were fabrics composed of "worsted," or of "worsted and cotton," and were woven in the gray or natural color of the "worsted," or of the "worsted and cotton," and after being woven were sent to print works, where they were first bleached, and then either dyed (*i. e.*, stained or col-
22 ored) or printed, the figures or colored decoration being impressed upon one side of the fabric by a process analogous to the art of printing. Such printed goods, being printed upon one side only, could be worn upon one side only; but when dyed, (*i. e.*, stained or colored,) as they sometimes were, could be and were worn on both sides.

It also appeared in evidence that delaines, as known in 1861 and 1862, and prior thereto, were composed of cotton warp and worsted weft.

That cashmere delaines were composed of cotton warp and worsted weft, and were twilled on one side, were heavier than a delaine, and were used for winter wear.

That muslin delaines were all worsted, both warp and weft, and made of finer and better material.

That barége delaines were composed of cotton warp and worsted weft, of finer, lighter, and better material than delaines, and were for spring or summer use.

23 The evidence also showed that beside delaines, cashmere delaines, muslin delaines, and barége delaines, there were other fabrics of ladies' dress goods, among which were goods generally called Challies, Persians, Armures, and Coburgs, which were manu-

factured of the same material, and in the same way as delaines, cashmere delaines, and barége delaines, and that these several fabrics belonged to the general family of delaines, but were usually known, both in the gray and also when dyed or printed, by the respective names above mentioned, at the time the acts of 1861 and 1862 were passed, and prior thereto. And the plaintiffs claimed that these were the "goods of similar description" to delaines, cashmere delaines, muslin delaines, and barége delaines referred to in the statute.

A Challie was made of finer and better material than an ordinary delaine, and more nearly resembling a barége delaine in its
24 weight, texture, and use, which was for spring wear.

A Persian was heavier than a Challie, being nearly the weight of an ordinary delaine, but made of finer and better material, and was a fabric of better quality than an ordinary delaine.

An Armure was woven like an ordinary delaine, except that a small raised figure was woven in the fabric like the figure in a bird's-eye draper.

A Coburg was twilled like a cashmere delaine, which it resembled in texture; but a cashmere delaine was single width, while a Coburg was double width, and was folded double lengthwise, and then rolled on a board. All the other dyed or printed goods were generally folded up, as sheetings or cotton prints are, but they were sometimes rolled on boards by special request of parties ordering the goods.

The plaintiffs' goods were made some of "worsted" and some of "worsted and cotton" yarns, the yarns being first dyed
25 in the skein and then woven upon a loom, using as many shuttles as there were colors in the weft of the fabric, and the fabric never existed in the gray or uncolored state, but the colors and the figure or design were woven into the fabric, which was complete and ready for the market and for use when it came from the loom. The colors were woven in, and the fabric, when completed, had two finished surfaces, and could, as a rule, be worn either side out, or turned when one side became defaced, but the goods had a right side and a wrong side. The goods, when finished, were put up by being rolled on boards.

Plaintiffs' goods did not exceed in value 40 cents per square yard.

It further appeared in evidence that the machinery used in the manufacture of the various kinds of delaines could not be used without alterations in the manufacture of the plaintiffs' goods when they were of more than one color, and that the printing ma-
26 chinery was not used at all in the manufacture of Saxony woven dress goods, the designs and surfaces of the latter being made by the act of weaving colored yarns into the fabric.

It also appeared in evidence that in England delaines were usually bought and sold in the gray, and then sent by the purchaser to print works or imported into this country, where they are dyed or printed to suit the taste of the purchaser; and that in England the printing or dy-ing of delaines was always done at a different manufactory from that where they were woven; and in this country, while the

weaving and printing may be done by the same company, they are done in separate departments and by a separate and distinct class of artisans.

There was also evidence tending to show that the plaintiffs' goods, beside the difference already mentioned, resulting from the mode of manufacture by weaving in colored yarns, were usually of
27 greater value than ordinary delaines, presented a different appearance to the eye and a different touch or feeling to the hand, and were of greater weight than the corresponding class of delaines, and were more durable and attractive than delaines.

The defendant proved that the plaintiffs' goods and delaines were made of the same materials, and were used for the same purposes, by the same class of people. The defendant introduced evidence tending to show that they were competing goods in the market of the United States, and presented themselves about the same time and at about the same prices; that they were similar in appearance and in patterns and styles, and the defendant introduced samples of both kinds of goods, which were made about the time of the plaintiffs' importations, for the purpose of showing their similarity. The defendant also introduced evidence tending to show that the plaintiffs' importations and delaines were similar in weight & simi-
28 lar in texture; that is, in the disposition or connection of the threads with respect to fineness or coarseness; and that the only dissimilarity consisted in the mode of applying the colors.

It also appeared in evidence, that delaines, cashmere delaines, muslin delaines, barége delaines, as well as Challies, Persians, Armures, and Coburgs, were long prior to the passage of the acts of March 2nd, 1861, and July 14th, 1862, largely manufactured in the United States, as well as abroad. But goods like the plaintiffs' had not been, at that time, nor were they until some years later, manufactured in this country.

John T. Hogeboom, called as a witness by the plaintiffs, testified that he was a U. S. appraiser from 1861 to 1875 or '6, that from his experience as such appraiser, and from an investigation of the subject, he was an expert, and fully qualified to testify as to the
29 characteristics of certain ladies' dress goods known as delaines, cashmere delaines, muslin delaines, and barége delaines, and goods of similar description, and also as to Saxony woven dress goods.

He was then shown samples of the (plaintiffs') goods in question, and was asked "Whether or not in trade among merchants goods like these (plaintiffs' samples) were known in 1861 and 1862 as goods of a similar description to delaines, cashmere delaines, muslin delaines, or barége delaines?"

To this question the defendants counsel objected, but not as to form of question. The court sustained the objection; the plaintiffs' counsel then and there duly excepted, which exception was duly noted and allowed by the court.

He was then asked:

"Are they, in your own opinion, as an expert, after examining this question, are Saxony woven dress goods—goods of similar de-

scription to delaines, cashmere delaines, muslin delaines, or barége delaines?"

30 To this question the defendant's counsel objected, as irrelevant and immaterial and incompetent, and on the further ground, that it called for the opinion of the witness, and not for a fact, and on the further ground, that the words of *similar description* contained in the law under which the plaintiffs' goods were classified for duty are to be taken in their popular sense, and was not a commercial phrase. The court sustained the objection; the plaintiffs' counsel then and there duly excepted, which exception was duly noted and allowed by the court.

The plaintiffs called a number of merchants, by whom they offered to prove that in trade among merchants, importers, wholesale dealers, and jobbers Saxony woven dress goods like the plaintiffs' in 1861 and 1862, and prior thereto, were not commercially known or considered as goods of similar description to delaines, cashmere delaines, muslin delaines, or barége delaines, but commercially belonged to another class, that of woven dress goods, classed as different

31 articles, and kept in a different department of goods from the family of printed dress goods, known as delaines, cashmere delaines, muslin delaines, and barége delaines.

To the introduction of this evidence the defendant's counsel objected, on the ground that the words "similar description" contained in the 9th section of the act of 1862 are to be taken and understood in their general sense in the community at large, and that the words were not used in a restrictive or commercial sense.

The court sustained the objection, and excluded the evidence.

To this ruling the plaintiffs' counsel then and there duly excepted, which exception was duly noted and allowed by the court.

Thomas L. Rushmore, a witness called by the plaintiffs, testified that he had been forty years engaged in the dry goods business, and familiar with delaines, and also with goods like plain-

32 tiffs' samples, and was asked:

"If you, as a merchant, received an order from a customer for fifty pieces of delaines, and goods of similar description, would you send goods like those samples B to L (meaning plaintiffs' samples)?"

To this question the defendant's counsel objected, but not as to form of question, and the court sustained the objection; to which ruling the plaintiff's counsel then and there duly excepted, which exception was duly noted and allowed by the court.

Mr. Hogeboom further testified that the Secretary of the Treasury, in August, 1862, requested the board of U. S. appraisers at the port of New York to report to him what articles of ladies' dress fabrics, composed of worsted and cotton, wool and cotton, &c., in their judgment should be classified as goods of similar description to delaines, cashmere delaines, muslin delaines, and barége delaines under the last clause of the 9th section of the act of July 14th, 1862.

33 That in pursuance of that request he, as one of said appraisers, made a special and elaborate investigation of the subject; conferred with merchants and manufacturers, collected numerous

samples, and embodied the result of that investigation in a report to the Secretary of the Treasury, dated September 9th, 1862, which was signed by John T. Hogeboom, Isaac O. Hunt, and Isaac Phillips, who, at that time, constituted the board of U. S. appraisers at the port of New York, and transmitted the same, with the samples collected, to the Secretary of the Treasury on or about that date, September 9th, 1862.

And the plaintiffs having proved that a proper application in writing had been made to the Secretary of the Treasury for a certified copy of this report, and that he replied that it could not be found on file in his Department, the plaintiffs, for the purpose of showing the opinions entertained by these U. S. appraisers, after the elaborate enquiry and investigation of the subject made by them upon the question what goods were, in their judgment, or in com-
34 mercial parlance, of similar description to delaines, and a copy of said report having been retained by and copied into the letter-book of said board of appraisers by the witness, the plaintiffs offered in evidence a copy of this report, proved to be such by the testimony of Judge Hogeboom.

The defendant's counsel objected to so much of the report as contained the conclusions of the witness or of the appraisers, from the facts which they detailed, and the court excluded so much of said report; to which ruling the counsel for the plaintiffs then and then and there duly excepted, which exception was duly noted and allowed by the court.

The witness read without objection, and testified to all the facts mentioned in his report.

Said witness further testified: That the appraisers at New York were instructed by the Secretary of the Treasury to classify all ladies' and children's dress goods composed of worsted and cotton, wool and cotton, mohair and cotton, and goat's hair and cot-
35 ton as "goods of similar description to delaines." Was then asked: "Were there any fabrics of ladies' or children's dress goods composed of worsted and cotton, wool and cotton, mohair and cotton, or goat's hair and cotton which the appraisers did not return as 'goods of similar description to delaines'?"

To this question the defendant's counsel objected, but not as to form of the question, and the court sustained the objection.

To this ruling the plaintiffs' counsel duly excepted, which exception was duly noted and allowed by the court.

The plaintiffs' counsel offered to prove that the defendant, from and after the passage of the tariff act of July 14th, 1862, up to April, 1863, interpreted this law as the plaintiffs did, and now do, and that all their invoices, being a large number of the same description of goods as those involved in this suit, were entered at the custom-house as "manufactures of worsted," or "worsted and cotton," under the last clause of section 13 of the act of 1861,
36 and the corresponding clause of section 9 of the act of 1862, and were so returned by the U. S. appraisers, and assessed by the defendant, as collector, at 35 per centum ad valorem duty, and no more.

But the court, on the objection of the district attorney, excluded the evidence, to which ruling the plaintiffs' counsel duly excepted, which exception was then and there duly noted and allowed by the court.

The witness was further asked whether, under the act of 1862, (§ 9,) any ladies' or children's dress fabrics, composed of worsted, or of which worsted was a component material, not otherwise provided for, were returned or assessed at 35 per cent. duty.

To this question the defendant's counsel objected, but not as to form of question. The court sustained the objection. The plaintiffs' counsel then and there duly excepted, which exception was duly noted and allowed by the court.

He was then asked were there, under the 13th section of
37 the act of August, 1862, any goods returned by the appraisers as manufactures, not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool, worsted, hemp, jute, or flax, at 35 per cent. duty.

To this question the defendant's counsel objected, but not as to form of question. The court sustained the objection. The plaintiffs' counsel then and there duly excepted, which exception was duly noted and allowed by the court.

He was then asked whether, under the act of 1862, there were any goods manufactured of goats' hair or mohair, or of which goats' hair or mohair were component materials, not otherwise provided for, returned or assessed at 35 per cent. duty.

To this question the defendant's counsel objected, but not as to form of question. The court sustained the objection. The plaintiffs then and there duly excepted, which exception was then and there duly noted and allowed by the court.

38 Plaintiffs' counsel requested the court to charge and instruct the jury as follows:

First. The defendant having admitted on the trial that plaintiffs' goods, samples of which were produced, were not woven in the gray or natural color of the worsted, or worsted and cotton, but woven in colors, the jury must find for the plaintiffs.

The court declined so to rule and charge the jury, to which ruling the plaintiffs' counsel duly excepted, which exception was then and there duly noted and allowed by the court.

Second. That the 13th section of the act of March 3rd, 1861, and the 9th section of the act of July 14, 1862, which provides that in addition to the duties heretofore imposed by law * * * * * there shall be levied, collected, and paid * * * * on all delaines, cashmere delaines, muslin delaines, barége delaines, composed wholly or in part of worsted, wool, mohair, or goats' hair, and on all
39 goods of similar description, not exceeding in value 40 cents per square yard, two cents per square yard, apply only to goods which are woven in the gray or natural color of the material, whether subsequently stained, colored, or printed or left in the gray, and are not applicable to goods woven in colors from dyed yarns. And if from the evidence the jury believe that the plaintiffs' goods were not woven in the gray or natural color of the worsted, or worsted

and cotton, but were woven in colors from dyed yarns, then their verdict must be for the plaintiffs.

The court declined so to rule and charge the jury, to which ruling the plaintiffs' counsel duly excepted, which exception was then and there duly noted and allowed by the court.

Third. That if the jury shall find that the plaintiffs' goods were manufactured from dyed yarns of worsted, or worsted and cotton, and were not manufactures possessing the peculiarity which distinguish delaines from other manufactures of worsted and cotton, then such goods were properly dutiable under the last clause of section 13 of the act of March 2nd, 1861, and the corre-
40 sponding clause of the 9th section of the act of July 14th, 1862, as manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, and their verdict must be for the plaintiffs.

The court declined so to rule and charge the jury, to which ruling the plaintiffs' counsel duly excepted, which exception was then and there duly noted and allowed by the court.

Fourth. That the words "similar description" in the delaine clause of the tariff act of 1862 refer to such goods as have the greatest number of characteristics in common with delaines, and it is competent for the jury to regard the being woven in the gray or uncolored worsted, to which class these words were limited in the tariff act of 1861, as the first and chief criterion of a comparison, and in applying these words to goods having colored designs or figures upon them it is competent for the jury to demand colored designs or figures should be produced by a similar process as produced in the manufacture of delaines, and if the colored designs or
41 figures on delaines are always produced by printing or staining after the cloth is manufactured in the gray, and the designs or figures upon the cloth in question were all produced in the loom by the art of weaving colored yarns, then it is competent for the jury to say that the cloths are not goods of similar description; and if the goods on which these duties were assessed differ from delaines considerably, in process of dressing and preparing, or in process of manufacture, or in weaving, or in the quality or cost, or in the capacity of being worn either side out, or in their appearance, or in touch, feeling, or adaption to peculiar tastes of customers, or in being ready colored for the market as dress goods when they leave the loom, without going to print or dye works, then the jury are authorized to find that they are not goods of similar description to delaines.

The court declined so to rule and charge the jury, to which ruling the plaintiffs counsel duly excepted, which exception was then and there duly noted and allowed by the court.

42 Fifth. If it has been shown by a preponderance of evidence that the goods in controversy, in consequence of the mode of their manufacture, appearance, or any other circumstance, were not regarded in this community in 1862, and previously, as articles of similar description to delaines, cashmere delaines, muslin delaines, barége delaines, *barége delaines*, composed wholly or in part of worsted,

wool, mohair, or goat hair, then the verdict must be for the plaintiffs.

The court declined so to rule and charge the jury, to which ruling the plaintiffs' counsel duly excepted, which exception was then and there duly noted and allowed by the court.

Sixth. If the jury shall find that there were goods in the market in 1861 and 1862 known as Persians, Challis, Coburgs, and Armures, but which were not enumerated by those names in the tariff acts of 1861 and 1862, and if they find that those goods were similar to delaines, being woven in the gray, and then stained, colored,
43 or printed, then the language of the 13th section of the act of 1861 and the 9th section of the act of 1862, imposing a square yard duty on delaines and goods of a similar description, is satisfied.

The court declined so to rule and charge the jury, to which ruling the plaintiffs' counsel duly excepted, which exception was then and there duly noted and allowed by the court.

Seventh. Revenue laws designate and class substances according to the general usage and known denomination of trade; the words "all goods of a similar description" in the tariff act of 1862 refer to a similarity for revenue purposes to the goods previously enumerated in section 13 of the tariff act of 1861, and this is determined by what was then generally known and classed among merchants as goods of similar description to delaines, and if being woven in the gray or natural color of the worsted and other materials of which they are composed, is found to have been an impor-
44 tant and prevailing characteristic, commercially distinguishing goods known among merchants as of similar description to delaines, then the goods on which the duties in this case were assessed were not of similar description to delaines, unless the jury find they were so woven in the gray or natural color of the worsted or worsted and cotton, and unless these goods possess all the prevailing characteristics which, in 1861, were commonly understood among merchants as distinguishing goods, known in commerce as of a similar description to delaines, from all other goods, the plaintiffs are entitled to a verdict.

The court declined so to rule and charge the jury; to which ruling the plaintiffs' counsel duly excepted, which exception was then and there duly noted and allowed by the court.

Eighth. That in determining the question whether or not the articles in controversy are of similar description to delaines, cashmere delaines, muslin delaines, or barège delaines, composed
45 wholly or in part of worsted, wool, mohair, or goat's hair, the jury are not to take into consideration the use to which Saxony woven dress goods are applied at the time of and previous to the passage of the tariff act of 1862, because the intent of Congress to the contrary is clearly shown by another provision in the same section, to wit, that balmoral skirts, or goods of like description, or used for like purposes, made wholly or in part of wool, shall be subjected to the same duties that are levied upon ready-made clothing, and therefore the use of an article has no bearing upon the term "similar description," as above quoted.

The court declined so to rule and charge the jury; to which ruling the plaintiffs' counsel duly excepted, which exception was then and there duly noted and allowed by the court.

Ninth. That it is a well-settled principle, in the interpreta-
46 tion of revenue laws, in cases of serious ambiguity in the language of the act, or doubtful classification of articles, the construction is to be in favor of the importer, as duties are never imposed on the citizen upon doubtful interpretations.

And if the jury, upon the evidence in this case, shall be in doubt whether Saxony woven dress goods like plaintiffs', were or were not of similar description to delaines, then their verdict shall be for the plaintiffs.

The court declined so to rule and charge the jury; to which ruling the plaintiffs' counsel duly excepted, which exception was then and there duly noted and allowed by the court.

The court charged the jury as follows:

Judge's Charge.

GENTLEMEN OF THE JURY: In the year 1863, the plaintiffs imported into this port sundry invoices of ladies' dress goods, made of worsted and cotton, commonly called Saxony dress goods or
47 Saxony woven dress goods.

The collector imposed a duty upon those goods at 30 per cent. ad valorem, and 2 cents per square yard, claiming that they were subject to that duty and rate of duty by the provision of the 9th section of the act of July 14th, 1862, which I shall hereafter quote.

The plaintiffs paid this amount of duty under protest, for the purpose of getting possession of their goods, protesting that they were liable to a duty of 35 per cent. ad valorem by virtue of other provisions of the same section of the same act.

After appeal to the Secretary of the Treasury, this action was brought to recover the alleged excess of duty thus paid under protest, and it is admitted that the action was brought in proper time, and that all the statutory prerequisites to the maintenance of the suit have been complied with. These goods were made of worsted and cotton. The worsted and cotton yarns were dyed pre-
48 vious to being woven, and the goods were woven in colors, or, in other words, the figures upon the goods were woven in in a loom. As a rule, though not as a rule without an exception, such goods presented the same general appearance on each side of the fabric, and therefore generally, although not always, can be worn on either side.

Delaines, at the time of which I shall hereafter speak, in 1861 and 1862, and subsequently, were dress goods for ladies' and children's wear, made wholly or in part of worsted, and when made in part only of worsted, made of worsted and cotton, and were woven in uncolored yarns, or woven in the gray, as it is termed. The gray or partially white fabrics were then bleached, and were printed—that is to say, the figures, or the colored decoration, were impressed

upon one side by a process analogous to the art of printing. Such printed goods were printed upon one side only, and therefore could be worn upon one side only. Sometimes they were dyed before being printed, but were not dyed in the yarn. Dyed and unprinted delaines could be and were worn on both sides.

49 This statement will enable you to understand the 13th section of the act of March 2d, 1861, which has been often alluded to, and so much thereof as is applicable to this case is undoubtedly as follows: "On all delaines, cashmere delaines, muslin delaines, barége delaines, composed wholly or in part of wool," afterwards amended so as to read "worsted," gray or uncolored; "and on all other gray or uncolored goods of similar description," was imposed a duty of 25 per cent. ad valorem "on bunting, and on all"—meaning on all delaines—"and on all other gray or uncolored goods of similar description, when stained, colored, or printed, and on all other manufactures of wool," afterwards amended to "worsted," "or of which worsted was a component material, not otherwise provided for," *thirty* per centum was imposed.

Printed delaines and printed goods, originally gray or uncolored, of similar description, were dutiable at 30 per cent. Saxony goods, not being originally in the gray, would not have been in-

50 cluded in that clause, but would have been dutiable at the same rate at 30 per cent. under the last clause of "all other manufactures of wool," &c., which I have read.

The act of July 14th, 1862, under which these importations were assessed, and which was an act to increase the duty on importations, provided that in addition to the duties theretofore imposed by law on the goods mentioned and included in the 9th section there shall be levied the following rates of duty: "On all delaines, cashmere delaines, muslin delaines, and barége delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of a similar description, not exceeding in value 40 cents per square yard, 2 cents per square yard; on bunting, worsted yarns, and on all other manufactures of worsted, or of which worsted should be a component material, not otherwise provided for, 5 per centum ad valorem."

It is not necessary to decide in this case what under this section was the proper rate of duty upon unprinted or uncolored delaines composed wholly or in part of worsted, wool, mohair, or goat's

51 hair, and on all goods of a similar description, but it is admitted that on the printed, colored, or stained delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description not exceeding in value 40 cents per square yard 2 cents per square yard and 30 per centum ad valorem was the proper duty and rate of duty.

The question in dispute between the parties is found in the words "on all goods of a similar description." The plaintiffs insist that Saxony dress goods are not of a description similar to printed, colored, or stained delaines. The defendant says that they are of a similar description. If they are proven to your satisfaction by a fair preponderance of proof to be not of a similar description, the plaintiffs are entitled to a verdict.

The plaintiffs insist that as matter of law goods of a similar description must be goods of a similar mode of manufacture with
delaines; that is, woven in the gray. As matter of law, I do
52 not think the plaintiffs' position is correct. I do not say, as matter of fact, the mode of manufacture does not produce effects or results which make the two classes of goods dissimilar.

In my opinion, by goods "of a similar description" was meant completed fabrics, composed wholly or in part of worsted, wool, mohair, or goat's hair, and used for dress goods, which, as completed fabrics, possess qualities of general appearance, character, and texture, like unto, or nearly corresponding with, or generally resembling the qualities which distinguish delaines, or cashmere delaines, or barége delaines, or muslin delaines. Goods of a similar description must be composed wholly or in part of worsted, or those of the other named materials, else they would be dissimilar. They must be used for the same purposes, else they would be dissimilar; but it may not necessarily follow that all dress goods, composed wholly or in part of worsted, are similar to delaines, for the art of the manufacturers has probably made goods of these two materials dissimilar
in appearance, texture, and the character of the product to
53 delaines.

The plaintiffs take, upon this question of fact, the burden of proof, and must satisfy you, by a fair preponderance of proof, that their goods are not in fact goods of a similar description to printed, or colored, or stained delaines. The presumption of law being in favor of the assessment, it is necessary to overcome that presumption by a fair preponderance of proof. Upon this question of fact there are, as I have said, certain conceded facts. Both classes of goods are made of the same material, and are used for the same purposes, one class of goods is woven of uncolored yarn, and is subsequently dyed or printed, the other class of goods is woven from dyed yarn and woven in figures in the loom; the mode of manufacture is different.

As I have also told you, it does not necessarily follow that because the mode of manufacture is different, the goods are dissimilar, because the dissimilarity must be in the *completed fabric*, or the resultant
fabric. On this disputed question of fact the position of the
54 plaintiffs is this: That the respective modes of manufacture produce effects in the completed goods which are different, and produce, as a result, dissimilar fabrics.

That is, as I conceive, the precise question of fact which it is for you to decide. Taking up the points of difference which are named by the plaintiffs, they taking the burden of proof, the first point is substantially conceded, in that printed goods are finished only on one side, while goods woven in colors have, as a rule, two finished sides, and can be worn on either side. It seems also to be true that dyed and unprinted delaines can be worn on both sides.

The plaintiffs say that this distinction is a marked one, and distinguishes the whole class or family of delaines from goods woven in dyed yarns. That at least four members of the family of delaines were unnamed in the statute, namely, Persians, Armures, Challies, and Co-

burgs, and that there is no other such plain and obvious distinction between the various class of goods as this one of the appearance
55 of the wrong side, resulting from the mode of manufacture, and so the plaintiffs say that this difference in appearance of the respective fabrics make a marked and always easily to be recognized distinction. In the language of one of the witnesses, and it is expressed as tersely by them as can be, the distinction is the same as between the gingham and a print; in the language of another, it is the same as between butter and cheese.

Other dissimilarities are also suggested by the plaintiffs. One is, that the Saxony goods are more durable, and another is, that they are heavier, as a rule, than the corresponding class of delaines; and, third, that there is a difference in the touch—that the goods feel differently.

The defendant says that the two classes of goods are not only used for the same purposes, but are so used by the same class of people; each is a cheaper dress fabric, and each is worn by a class of persons who desire to pay only medium prices; that the Saxony goods were
56 a competing articles with delaines, and presented themselves about the same time, and at about the same prices, for the favor of the same class of purchasers, and that being competing goods, they are also similar in appearance; and here the defendant exhibits a card of samples of each kind of goods, which he says were all made about 1863, and which he says show for themselves how nearly those goods resemble each other. This card the defendant relies upon as his strong argument in opposition to the theory of the plaintiffs in regard to the dissimilarity in appearance, and he insists that there is no difference in appearance between dyed and unprinted delaines and Saxony goods. He also says that they are similar in price and similar in weight and similar in texture; that is, in the disposition or connection of the threads with respect to fineness or coarseness, and thus that this style of goods was, in the ordinary and general acceptation of the phrase, goods of a similar description to delaines, because they were similar in appear-
57 ance, in fineness, in general character, and were for the use of the same class, and that while they were not exactly alike, that there are differences between them; yet they are similar, and are of similar description; that is, the distinguishing qualities of one generally resembles the distinguishing qualities of the other.

The defendant furthermore says that each class is an imitation of all wool goods, made for the sake of cheapness, and so an imitation of the styles and colors which were popular in the market, and a more expensive article. The leading facts in the case are admitted on both sides. The points where the testimony differs are few, and the question in dispute, whether the admitted difference in the mode of manufacture produces as a result fabrics which are of a similar description, is one wherein the disputed facts cover a narrow range of testimony.

If you find for the plaintiffs, the verdict will be for $8,931.25
58 and interest, which will be computed by the custom-house experts.

To so much of the charge so stated—"The plaintiffs insist, as matter of law, that goods of similar description to delaines, cashmere delaines, muslin delaines, and barége delaines must be goods of a similar mode of manufacture with delaines; that is, woven in the gray. As matter of law, I do not think the plaintiffs' position is correct. I do not say, as matter of fact, the mode of manufacture does not produce effects or results which make the two classes of goods dissimilar; but, as matter of law, I charge you that the plaintiffs' position is not correct"—the plaintiffs' counsel then and there duly excepted, which exception was duly noted and allowed by the court.

To the first sentence of the following portion of the charge the plaintiffs duly excepted:

59 "In my opinion, by goods of a similar description was meant completed fabrics composed wholly or in part of worsted, wool, mohair, or goats' hair, and used for dress goods, which, as completed fabrics, possess qualities of general appearance, character, and texture, like unto, or nearly corresponding with, or generally resembling, the qualities which distinguish delaines, or cashmere delaines, or barége delaines, or muslin delaines. Goods of a similar description must be composed wholly or in part of worsted, or those of the other named materials, else they would be dissimilar. They must be used for the same purpose, else they would be dissimilar, but it may not necessarily follow, that all dress goods composed wholly or in part of worsted are similar to delaines, for the art of the manufacturers has probably made goods of these two materials dissimilar in appearance, texture, and the character of the product to delaines."

60 Which exception was duly noted and allowed by the court.

To the following portion of the charge: "The plaintiffs take upon this question of fact the burden of proof, and must satisfy you, by a fair preponderance of proof, that their goods are not in fact goods of a similar description to printed or colored or stained delaines. The presumption of law being in favor of the assessment it is necessary to overcome that presumption by a fair preponderance of proof," the plaintiffs' counsel then and there duly excepted, which exception was duly noted and allowed by the court.

The jury returned a verdict for the defendant.

And as none of the foregoing matters appear of record, the court has signed and sealed this bill of exceptions at the term of court at which said cause was tried, to wit, on the 23d day of November, A. D. 1879.

61 N. SHIPMAN, *Judge.* [L. S.]

Endorsed: O. S. 3015. U. S. circuit court, south. dist. of New York. Charles F. Schneider and Charles E. Schneider *vs.* Hiram Barney. Plaintiffs' case and exceptions. Almon W. Griswold, pl'ffs' att'y, 21 Cortlandt St., N. Y. city. U. S. circuit court. Filed Feb. 7, 1881. Joseph M. Deuel, clerk.

62 *Assignment of Errors.*

Supreme Court of the United States.

CHARLES F. SCHMIEDER, CHARLES E. SCHMIEDER, Plaintiffs in Error,
vs.
HIRAM BARNEY, Defendant in Error.

Of the October term, in the year of our Lord one thousand eight hundred and eighty-one.

Afterwards, to wit, on the second Monday in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said Charles F. Schmieder and Charles E. Schmieder, the plaintiffs in error, by A. W. Griswold, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit: That by
63 the record aforesaid it appears that the judgment aforesaid, in form aforesaid, was given for the said defendant in error against the said plaintiffs in error; whereas, by the law of the land, the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs pray that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they, the said plaintiffs, may be restored to all things which they have lost by occasion of said judgment, &c., &c.

A. W. GRISWOLD,
Att'y for the Plaintiffs in Error.

"Endorsed:" Supreme Court of the United States. Charles
64 F. Schmieder and Charles E. Schmieder, plaintiffs in error, *vs.* Hiram Barney, defendant in error. Assignment of errors. A. W. Griswold, att'y for pl'ffs in error. Due service of a copy admitted. Dated Oct. 6, 1881. Stewart L. Woodford, U. S. attorney for def't. U. S. circuit court. Filed Oct. 6th, 1881. Joseph M. Deuel, clerk.

65 *Joinder in Error.*

Supreme Court of the United States.

CHARLES F. SCHMIEDER & CHARLES E. SCHMIEDER, Plaintiffs in Error,
vs.
HIRAM BARNEY, D'f't in Error.

And afterwards, to wit, on the second Monday of October, 1881, the said Hiram Barney, defendant in error, by Stewart L. Woodford, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the records and

proceedings aforesaid as the matters aforesaid above assigned
66 for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEWART L. WOODFORD,
U. S. Attorney for Defendant in Error.

Endorsed: O. S. 2015. U. S. circuit court, south. dist. of New York. Charles F. Schmieder *et al.*, pl'ffs in error, *v.* Hiram Barney, d'f't in error. Joinder in error. S. L. Woodford, att'y for d'f't in error. Due service of a copy of within joinder in error is hereby admitted, dated Oct. 6., '81. A. W. Griswold, att'y for pl'ffs in error. U. S. circuit court. Filed Oct. 6, 1881. Joseph M. Deuel, clerk.

67 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

CHARLES E. SCHMIEDER and CHARLES F. SCHMIEDER, Plaintiffs in Error,

vs.

HIRAM BARNEY, Late Collector of Customs, Defendant in Error.

Know all men by these presents, that we, Albert Hanscom, of 52 West 125th street, in the city of New York, and Edward Purcell, of No. 431 West 57th street, in said city, are held and firmly bound unto the above-named Hiram Barney in the sum of three hundred and fifty dollars, to be paid to the said Hiram Barney, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the sixteenth day of April, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas the above-named Charles E. Schmieder & Charles F. Schmieder have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the Southern District of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Charles E. Schmieder & Charles F. Schmieder shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void otherwise the same shall be and remain in full force and virtue.

ALBERT HANSCOM. [L. S.]
EDWARD PURCELL. [L. S.]

Sealed and delivered and taken and acknowledged, this 16th day of April, 1881, before me.

[L. S.] A. HEYDENREICH,
Notary Public, Richmond Co., N. Y.

68 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Albert Hanscom and Edward Purcell, being severally duly sworn, do depose and say, and each for himself says, that he is worth the sum of seven hundred dollars, over and above all his just debts and liabilities.

EDWARD PURCELL.

Sworn to, this 19th day of April, A. D. 1881, before me.
[L. S.] A. HEYDENREICH,
Notary Public, Richmond Co., N. Y.

Approved.
SAM'L BLATCHFORD.

[Endorsed:] O. S. 3015. U. S. circuit court, south. district of New York. Charles E. Schmieder & Charles F. Schmieder, pl'ff's in error, *vs.* Hiram Barney, late collector of customs, d'f't in error. Bond for damages and costs on appeal to the U. S. Supreme Court. Almon W. Griswold, proctor, 21 Cortlandt St., New York. U. S. circuit court. Filed Apr. 19, 1881. Joseph M. Deuel, clerk.

69 UNITED STATES OF AMERICA, *ss:*

To Hiram Barney, late collector of customs, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-one, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles E. Schmieder and Charles F. Schmieder are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated New York, April 19th, 1881.

SAM'L BLATCHFORD.

70 [Endorsed:] U. S. Supreme Court. Charles E. Schmieder and Charles F. Schmieder, plaintiffs in error, against Hiram Barney, defendant in error. O. S. 3015. Citation. A. W. Griswold, pl'ffs' att'y. Due service of a copy of within is hereby admitted. Dated April 20th, 1881. Stewart L. Woodford, U. S. att'y for def't. U. S. circuit court. Filed Apr. 20, 1881. Joseph M. Deuel, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 109. Charles E. Schneider & Charles F. Schneider, plaintiffs in error, *vs.* Hiram Barney, late collector of customs. Filed October 15, 1881.

113—645

SUPREME COURT, U.S.
FILED
NOV. 20 1884
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

C. F. SCHMIEDER, et al.,
vs.
HIRAM BARNEY.
} No. 109.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

PLAINTIFF'S BRIEF.

68 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

Albert Hanscom and Edward Purcell, being severally duly sworn, do depose and say, and each for himself says, that he is worth the sum of seven hundred dollars, over and above all his just debts and liabilities.

EDWARD PURCELL.

Sworn to, this 19th day of April, A. D. 1881, before me.
[L. S.] A. HEYDENREICH,
Notary Public, Richmond Co., N. Y.

Approved.
SAM'L BLATCHFORD.

[Endorsed:] O. S. 3015. U. S. circuit court, south. district of New York. Charles E. Schmieder & Charles F. Schmieder, pl'ff's in error, *vs.* Hiram Barney, late collector of customs, d'f't in error. Bond for damages and costs on appeal to the U. S. Supreme Court. Almon W. Griswold, proctor, 21 Cortlandt St., New York. U. S. circuit court. Filed Apr. 19, 1881. Joseph M. Deuel, clerk.

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Dated New York, April 19th, 1881.

SAM'L BLATCHFORD.

70 [Endorsed:] U. S. Supreme Court. Charles E. Schmieder and Charles F. Schmieder, plaintiffs in error, against Hiram Barney, defendant in error. O. S. 3015. Citation. A. W. Griswold, pl'ffs' att'y. Due service of a copy of within is hereby admitted. Dated April 20th, 1881. Stewart L. Woodford, U. S. att'y for def't. U. S. circuit court. Filed Apr. 20, 1881. Joseph M. Deuel, clerk.

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} No. 109.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

PLAINTIFF'S BRIEF.

James L. Black, Printer, 57 College Place, N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

C. F. SCHMIEDER, et al.
vs.
HIRAM BARNEY.

No. 109.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Plaintiffs' Brief.

ORIGIN AND NATURE OF THE QUESTION AT ISSUE.

What rate of duty was levied by the law of 1862 on Saxony woven dress goods? A preliminary and underlying question is this:

Were the plaintiffs' Saxony woven dress goods "goods of similar description" as compared with the "Delaines" specified in the ninth section of the law of July 14, 1862.

12 Stat. at Large, 553.

Even the most cursory and general reference to the legislative history, as set forth in modern American tariff laws, of the word "Delaine," and the several adjectives from time to time applied to the word in those laws, will illustrate and enforce the reason and truth of the rule that tariff laws "are intended for practical use

and application by men engaged in commerce"—using the word commerce in its largest international sense. A tariff law must of necessity relate to international transactions, and not solely to such buying and selling as is altogether national and domestic.

"Delaine" was, in the beginning, an English fabric of cotton and worsted. In 1846, it was not well enough known, if it existed, to appear, by name, in the American Tariff law of that year. If imported under that law it was classified under Schedule D, as a manufacture of cotton and worsted. The tariff law of 1857 was the first to contain the word "Delaines." It is in the sentence declaring that "all manufactures composed wholly of cotton * * and *delaines* shall be transferred to Schedule D." Up to that time no English dictionary contained the word. Soon after, or about the time of the enactment of the law of 1857, a fabric similar to the English "Delaine" began to be manufactured in the United States. Prior to 1857 there was made in France a fabric of Worsted, and sometimes with a little silk (not cotton) that was known and imported as "Mousseline Delaine." There were then also articles specifically known as "Challies" and as "Barége Delaines," and as "Cashmere Delaines." These two last named fabrics were not by the Treasury Department classified as "Delaines" under the law of 1857. "Mousseline Delaines" of worsted and silk and worsted were, however, so classified, but, on a trial in the Circuit Court for the Southern District of New York, in 1879, the classification of the Treasury was declared unlawful. From 1857 to 1861 there was no change in the Tariff law. During those four years there had in trade and commerce been swept into the general classification of "Delaines" a large class and variety of cotton and worsted fabrics woven with gray or uncolored yarns, and used for women's wearing apparel. The peculiar trade names of such fabrics were specified in the law of March, 1861, although the law blundered by not recognizing the trade distinction between "wool" and

"worsted." That law of 1861 also levied duty at a different rate on another class of cotton and worsted fabrics, woven in colors from dyed yarns, which were classified generally as "Woven Dress Goods," to distinguish them from the family of "Delaines." These distinctive general classifications began in the laws of 1861 and 1862, and were maintained till June 3, 1864, as the eye will quickly see by glancing at the accompanying pertinent extracts from the tariff laws of 1846, 1857, 1861, 1862 and 1864, arranged in columns according to the year.

The words "delaines," "cashmere delaines," "muslin delaines," and "barége delaines" disappear from the tariff law in 1864, and the phrase "women's and children's dress goods" takes their places. By force of the comprehensive and peremptory language of the law of 1864, all "delaines" were carried into and under the generic phrase "women's and children's dress goods," as that phrase was, in 1864, understood "by men engaged in commerce." The commercial and statutory difference between "delaines" and "Saxony woven dress goods," which had existed up to 1864, was for tariff purposes obliterated by the law of that date.

That up to 1864, and especially in 1862, "dress goods" and "delaines" were treated by Congress as separate things, and subject to different rates of duty, seems also to appear from page 903 of the House Journal of the second session of the Thirty-seventh Congress. The bill, which afterwards emerged as the tariff law of 1862, was reported to the House on June 20, 1862, and its ninth section read thus:

Line 52—"On all delaines, cashmere delaines, muslin delaines, barége"

" 53—"delaines composed wholly or in part of worsted, and on"

" 54—all goods of similar description, and *all dress goods.*"

Line 55—"*composed of worsted or cotton, or wool and cotton.*"
" 56—" not exceeding in value forty cents per square yard, three "
" 57—" cents per square yard."
" 58—" On bunting, worsted yarns, and all other manufactures of "
" 59—" worsted, or of which worsted shall be a component "
" 60—" material, not otherwise provided for, five per centum ad "
" 61—" valorem."

But on the 27th of June, this bill being under consideration in the House, Mr. Morrill, of Vermont, moved to insert in fifty-third line, after "*worsted*" the words "*wool, mohair or goat's hair,*" and to strike out the words "*and all dress goods composed of worsted and cotton or wool and cotton,*" in lines fifty-four and fifty-five, which was agreed to.

See Congressional Globe, part 4, second session Thirty-seventh Congress, p. 2,978.

Is not the inference a fair one, that Mr. Morrill and the House recognized "dress goods" as commercially distinct from "delaines," and that, up to March 20, 1863, the Treasury was right in only levying 35 per cent. on the plaintiffs' goods as being such "dress goods?" At any rate, under the two tariff laws of 1861, fabrics similar to the plaintiffs' Saxony woven dress goods were classified, by virtue of the 22d section of the law of March, 1861, as "manufactures not otherwise provided for, composed of mixed materials" etc., and duty was levied at 30 per cent. ad valorem, as on "dress goods." The Treasury did not pretend that the plaintiffs' woven "dress goods" had been "provided for" in the 13th section of the law of 1861, as "goods of similar description." When the law of 1862 had been enacted, and was published for the guidance of importers, not

one of the importers of Saxony woven dress goods had a thought, or suspicion, that their fabrics could or would be, under the law, treated or classified as "similar" to the specified description of "delaines," and made subject to the square yard duty. Every importer believed that the Saxony woven "dress goods" should be, and would be, classified under the law of 1862 as manufactures of worsted * * * not otherwise provided for," and as dutiable at 35 per cent. ad valorem. Such was the interpretation put on the law of 1862, in the port of New York, up to March 20, 1863, when the Treasury Department, on a protest and appeal made in July, 1862, by Messrs. Stoddard & Lovering of Boston against the exaction from them by the collector of the Port of Boston of a square yard duty on Saxony woven dress goods, reversed the rate which had been levied in New York up to that date, and gave the following instruction to all collectors of customs:

"The question now arises, what constitutes 'similar "description?' I am of the opinion that all goods "composed of the same materials, and used for the same "purposes as a 'delaine,' must be treated as of 'similar "description.' No line of demarcation can be drawn "between one class of ladies' dress fabrics, composed of "the materials named in the section quoted and another "that will insure a satisfactory degree of uniformity "throughout the country. In this opinion a *majority* of "the experts of the customs, to whom the statute has "been referred, agree."

The large importers had meanwhile purchased, or ordered "to arrive," great quantities of the Saxony woven dress goods, and had sold the goods "to arrive" on the basis of 35 per centum *ad valorem*. The sudden change in the classification from "dress goods" to "delaines," ordered by the Treasury in March, 1863, inflicted enormous losses on the importers, and especially on the plaintiffs. Litigation of the question at issue between the importers and the Treasury immediately began. The case of *Schmieder et al. vs. Barney*, now at bar, was first

tried in the New York circuit on January, 1867, before Judge Smalley. It came before this Court, and afterwards came to be reported (1869) in *Barney vs Schmieder* (9 Wallace, 248). The judge took the case from the jury, upon the ground that the decision of the Treasury Department, from which an extract has just been made, dated March 20, 1863, was unauthorized by the law of 1862, inasmuch as the omission by Congress to use the words "grey or uncolored" in the law of 1862 did not make the plaintiffs' "dress goods" any more "delaines" or any more "similar" to delaines, under the law of 1862, than they had been under the laws of 1861. This Court therefore sent the case, now at bar, back to the Circuit Court for a new trial, but, upon the ground that the judge did not submit to the jury the evidence bearing on the question of similarity between the plaintiffs' "dress goods" and "delaines." Judge Smalley was of the opinion that under the law of 1862, as under the laws of 1861, the similarity of the "dress goods" must be to "*grey and uncolored*" or stained colored and printed delaines, and that there was no evidence which could sustain a verdict that the plaintiffs' goods were similar. He erred in interpreting the phrase "grey or uncolored" into the law of 1862 after Congress had omitted the words.

Meanwhile and before the case of *Schmieder vs. Barney* was retried in New York, the case of *Greenleaf vs. Goodrich*, presenting a similar issue, was tried in the First Federal Circuit, came to this Court on a writ of error, and is reported (1879) in 101 U. S. Reports, p. 278. The views of the law of 1862, taken by the Court in the First Circuit, were adopted by this Court, so far as they related to *weaving in the grey*, and to the color of the "delaines" with which the plaintiffs' goods were to be compared by the jury under the law of 1862. The plaintiffs' in the case, now at bar, do not question or criticize the decision of this Court, that the jury must determine if the fabric in controversy was "similar" in

description to these delaines, no matter *whether the latter be colored or uncolored.*

After the trial of the case of *Greenleaf vs. Goodrich*, in Boston, and before the decision in this Court (101 U. S. Reports, p. 278) was delivered, the case, now at bar, of *Schmieder et al. vs. Barney* was tried a second time in New York.

ASSIGNMENT OF ERRORS.

The errors assigned are:

1st. "The plaintiffs called a number of merchants, by whom they "offered to prove, that in trade among merchants, importers, whole- "sale dealers, and jobbers, Saxony woven dress goods, like the plain- "tiff's, in 1861 and 1862, and prior thereto, were not commercially "known or considered as goods of similar description to delaines, "cashmere delaines, muslin delaines, or barège delaines, but commer- "cially belonged to another class. that of woven dress goods, classed "as different articles, and kept in a different department of goods "from the family of printed dress goods, known as delaines, cashmere "delaines, muslin delaines, and barége delaines."

But the Court excluded the evidence and plaintiffs excepted. Page 10, folio 30-1.

2d. The plaintiff's called John T. Hogeboom, who testified that he was a U. S. Appraiser from 1861 to 1875. * * * "That the Secretary "of the Treasury, in August, 1862, requested the Board of U. S. Ap- "praisers at New York, to report to him what articles of ladies' dress "fabrics composed of worsted and cotton, wool and cotton, &c., in their "judgment, should be classified as goods of similar description to delaines, "cashmere delaines, muslin delaines, and barége delaines, under the "last clause of the 9th Section of the Act of July 14th, 1862. That in "pursuance of that request he, as one of said appraisers, made a spec- "ial and elaborate investigation of the subject; conferred with mer- "chants and manufacturers, collected numerous samples, and embodied "the result in a report to the Secretary of the Treasury, dated Sept. 9, "1862, which was signed by John T. Hageboom, Isaac O. Hunt, and "Isaac Phillips, who at that time constituted the Board of U. S. "Appraisers at New York, and transmitted the same, with the samples "collected, to the Secretary of the Treasury, on or about September "9th, 1862." * * * * *

"For the purpose of showing the opinions entertained by these U. S. "appraisers, after the elaborate inquiry and investigation of the subject, " * * as to what goods were, in their judgment, or in commer- "cial parlance of similar description to delaines, * * *
"plaintiffs offered in evidence a copy of this report * * *

But the Court excluded the evidence, and plaintiffs excepted (folio 32–5.).

3d. Mr. Hogeboom, after stating that he was an expert, and fully qualified to testify as to the characteristics of certain ladies' dress goods, "known as delaines, cashmere delaines, muslin delaines, andbarége de-"laines, and goods of similar description, and also as to Saxony woven "dress goods, was shown samples of plaintiff's goods * * and "asked whether or not, in trade among merchants' goods like these "* * were known in 1861 and 1862 as goods of similar description to delaines."

But the Court excluded the evidence, and plaintiffs excepted.

He was then asked, "Are they, in your own opinion as an expert, after examining this question – are Saxony woven dress goods, goods of similar description to delaines, cashmere delaines, muslin delaines or barége delaines."

But the Court excluded the evidence and plaintiffs excepted, folio 29–30.

4th. "The plaintiffs offered to prove that the defendant, from and "after the passage of the tariff Act of July, 1862, up to April, 1863, in-"terpreted this law as plaintiffs did, and now do * * * and that all "their invoices, being a great number * * of the same description of "goods as those involved in this suit, were entered and passed at the "Custom House and returned by the United States Appraisers as man-"ufactures of worsted or worsted and cotton at 35 per cent."

But the Court excluded the evidence and plaintiffs excepted, folios 35–36.

THE MANIFEST ERRORS TO BE CORRECTED.

According to the decision of this Court, in *Greenleaf vs. Goodrich*, the fact in issue in *Schmieder et al. vs. Barney*, is whether or not the plaintiffs' fabric was, in July, 1862, or thereabouts, "similar in description" to the "delaines" specified in that law, whether they be colored or uncolored. The Court, on the trial of the case at bar, excluded the testimony of commercial experts, by whom the plaintiffs' offered to prove, that in the principal markets of the United States for the fabrics in controversy, the plaintiffs' fabric was not considered by importers and dealers engaged in buying and selling the fabrics, as "goods of similar description" with the

specified delaines, and the exclusion was put on the ground that the opinion and fact thus offered in evidence were not relevant to the fact in issue, according to the accepted rules and laws of evidence. The Court below said, in effect, to the triers of *Schmieder et al. vs. Barney*, that the fact (even if proved) that importers and dealers, competent to testify as experts, did not consider and treat the two fabrics, or the two classes of fabrics, as "similar in description," was not so related to the fact of similarity in issue that, in law, the existence of the former fact would prove or render probable the existence or non-existence of the other fact. In other words, the Court below said that the former was, in law, only an *inadmissible* opinion of merchants, and was not an *admissible* fact.

That ruling was a manifest error:

On page 282 of *Greenleaf vs. Goodrich*, the Court say:

"The record exhibits nothing tending to show what "was commonly understood *among merchants* as distin- "guishing goods known in commerce as of a similar "description with delaines, from all other goods. Nor "was there any evidence that there were any goods, "*known by merchants, or in commerce*, as goods of a sim- "ilar description with delaines, much less was it in proof "that being woven in the grey was regarded by mer- "chants as determining that goods so woven were not "of similar description with delaines. In regard to all "these matters the record is silent.

Assistant Attorney-General Smith, in the last sentence of his brief for the defendant in error, in *Greenleaf vs. Goodrich*, said, in allusion to the words, "similar description—"

"It may be observed that the exceptions will be "searched in vain for any support to the idea that these "words then had any technical force as a commercial "description; or that, if so, these goods were not thus "designated. So this exception is immaterial, and the

"complainants could not be injured or aggrieved "thereby."

It is precisely the opinion and the fact referred to by the Assistant Attorney-General, and by this Court, that were excluded in the Court below on the trial of *Schmieder et al., vs. Barney*, and unlawfully excluded.

THE PHRASE "GOODS OF SIMILAR DESCRIPTION," AS USED IN THE LAW OF 1862, IS SO FAR A COMMERCIAL PHRASE AS TO PERMIT AND REQUIRE THE OPINION OF MERCANTILE MEN WHEN OFFERED, TO BE GIVEN TO THE JURY, IN RESPECT TO ITS MEANING AND APPLICATION, EVEN ALTHOUGH THE JURY ARE TO ASCERTAIN ITS MEANING AND APPLICATION AS UNDERSTOOD BY THE COMMUNITY GENERALLY.

The two primary objects of an American tariff law are, first, to so classify imported articles, or articles likely to be imported, that the classification may be easily appreciated and acted upon in a business sense, by persons engaged in the business of importation; and, secondly, to clearly affix to each and all such articles the prescribed rates of duty. The classification of foreign articles, in existence or to be in existence in foreign countries, and likely to be imported into the United States, is, of course, a difficult and perplexing legislative task. One method of identification of each article made dutiable by Congress, has been to specify and enumerate the articles by their trade names, wherever that is possible; and to specify and enumerate the remaining articles either by the component materials of manufacture, or by the phrase "not otherwise provided for." The American tariff law has also, when an article could not be otherwise clearly described or anticipated, endeavored to identify it by the phrase "similar articles." That phrase is used in the laws of 1846 and 1857, which laws, having both been drafted at the Treasury

Department, exhibit better workmanship by the draughtsman than do subsequent tariff laws which were framed in the Committee room of the House of Representatives. There are exceptional instances where the *use* of an article aids identification, but in every such instance it is believed that the statute makes the *use* to which the article is to be applied an essential part of the description. It is believed that no American tariff law can be found in which the *use* can be held to be a portion of the description identifying the article, unless Congress has declared that such use shall be thus a part of the description. It may be safely said, in general, that the American tariff laws endeavor to describe articles—first, by their trade mark; next by the material of manufacture, or the process of manufacture; next by similarity to articles already specifically described; and finally but rarely, by the *use* of the article. The name, texture, material, fabric, or process of manufacture, or use, constitute the elements of description or classification, according as Congress has indicated; but when Congress has intended that a similarity of use should enter into the description of articles, it has said so in specific terms, and has not left that mode of definition to inference or application. All this becomes plain to the eye by a critical examination of the tariff law of 1862, as a test and example of American tariff legislation. In that Statute the phrase "all descriptions," "like description," "every description," "whatever description" frequently occurs. The phrase "all descriptions" occurs twelve times; the phrase "like descriptions" occurs six times; the phrase "every description" occurs six times; the phrase "all kinds" occurs eight times; the phrase "all other descriptions" occurs three times; the phrase "whatever description" occurs once; the phrase "similar articles" occurs twice; the phrase "similar preparations" occurs once; and the phrase "similar description" occurs but once, and then in the clause now in controversy. The word "description" is used in the Act of 1862 only twice as referring to the process of manufac-

ture. It is believed that an examination of the law of 1862 will show conclusively that the word "description" could have been intended by Congress only to refer to the article as a completed product, and that when Congress intended that the *use* of the article should be controlling, or especially important in deciding the question of similarity, Congress employed the phrase "used for like purposes," or "used for," or "suitable to the use to which." Nowhere in the law of 1862, or in any other American tariff law, can the phrase "similar description of *uses*" be found.

The enacting clause of each section of the law of 1862 begins thus: "That, in addition to the duties imposed by law, there shall be levied on the goods, wares, merchandise herein enumerated."

The enumeration must of necessity be taken to refer to the description and classification in existence, and understood at the date of the enactment of the law in question; for, otherwise it might be that descriptions of articles could be changed and modified in a way to evade the law, injure the revenue, and inflict losses upon importers and others who purchase merchandise in large quantities and hold it in stock for sale at a subsequent time more or less remote.

In the practical execution of a tariff law, levying duties upon so many articles as does the American Statute, it must needs happen that conflict of opinion will arise, not only among Treasury officials charged with the execution of the law, but between importers and the Treasury Department, in respect to the definition to be given to terms used in tariff legislation. This Court had occasion to deal, more than sixty years ago, with such conflict of opinion arising under the Tariff law of 1816. The inquiry arose respecting the intention of Congress when it used the word "Bohea" as applied to tea in that law of 1816. On one side it was insiste that Congress referred to an article known as "Congo' Tea, and, on the other side, it was insisted that Congress referred to an article known as "Bohea Tea." How

was it to be ascertained what and which Congress did mean? This Court, in the year 1824, prescribed a rule and test, in the case of 200 *Chests of Tea* (9 *Wheaton*, 430), which rule and test has been ever since enforced. In recognition of, and in conformity to that rule and test, it is to be assumed that every subsequent tariff law has been framed, unless an intention to disregard the rule and test has been distinctly declared by Congress, as was done by Congress in the first section of the Tariff Act of February 8, 1875 (18 Statute, 307), when Congress prescribed that a certain rate of duty should be levied on a specified article "irrespective of the classification thereof for "duty by or under previous laws, *or their commercial designation.*"

In the case of the 200 *Chests of Tea*, the Court say:

"Congress must be understood to use the word in its known com-
"mercial sense. The object of the duty laws is to raise revenue, and
"for this purpose has classed substances according to the general usage
"and known designation of trade. * * It (Congress) applied
"its attention to the description of articles as they derived their appel-
"lations in our own markets, in our domestic as well as our foreign
"traffic. And it would have been as dangerous, as useless, to attempt
"any other classification than that derived from the actual business of
"human life."

Nine years afterwards, in *Barlow v. the United States* (7 Peters, 404) this Court said:

"The acts of Congress on this subject are regulations of commerce
"and revenue; and there is no attempt in any of them to define the
"distinguishing qualities of any of the commodities which are mentioned
"therein. Congress must be presumed to *use the words* in their known
"and habitual commercial sense; not indeed in that of foreign countries
"if it should differ from ours; but in that known in our own trade,
"foreign and domestic. If in a loose signification among refiners,
"sugar should sometimes be spoken of as being refined, without having
"undergone the further process of claying, or if the whole mass result-
"ing from that process should sometimes indiscriminately acquire
"among them that appellation in a like loose signification; still, if
"among buyers and sellers generally in the course of trade and busi-
"ness, the appellation "refined sugars" is exclusively limited to the
"products called lump and loaf sugar, and never includes bastard
"sugar, the Acts of Congress ought to be construed in this restrictive
"sense *as that peculiarly belonging to commerce.*"

One year later, in *United States v. 112 Casks of Sugar*, (8 Peters, 277), this Court said:

"With respect to this and all other testimony of this description, it "is only necessary to observe that the denomination of merchandise "subject to the payment of duties is to be understood in a commercial "sense, although it may not be scientifically correct. *All laws regulating "the payment of duties* are for practical application to commercial oper- "ations, and are to be understood in a commercial sense. And it is to "be presumed that Congress so used and intended them to be under- "stood."

Two years later this Court, in the case of *Elliott v. Swartwout* (10 Peters, 150), reaffirmed this rule and test, and added:

"*Laws imposing duties* on importation of goods are intended for prac- "tical use and application by men engaged in commerce; and hence it "has become a settled rule in the interpretation of statutes of this "description to *construe the language adopted by the legislature*, and "particularly in the denomination of articles, according to the commer- "cial understanding of the terms used. This rule is fully recognized "and established by this Court in the case of the *Two Hundred Chests "of Tea* reported in 9 Wheaton, 438."

The critical question in this last mentioned case was the difference between wool and worsted—a difference which it would to-day puzzle the average citizen and juryman to distinctly define—and a difference overlooked by Congress a quarter of a century afterwards, in the enactment of the 13th Section of the Act of March 2d, 1861, which overlooking required special legislation in the subsequent law of August, 1861.

Eight years after the decision in *Elliott v. Swartwout*, this Court, in 1844, and in the case of *Curtis v. Martin*, (3 Howard, 106) again reaffirms the rule and test in this language:

'It has long been a settled rule of construction of revenue laws "imposing duties on articles of a specified denomination, to construe "the article according to the designation of such articles as understood "and known in commerce, and not with reference to the materials of "which they may be made, or the use to which they might be applied. "Nor ought such laws to be construed as embracing all articles which "might subsequently be applied to the same use and purpose as the "specific article."

Nine years afterward, and in the case of *Maillard v. Lawrence* (16 Howard, 251), this rule and test received most elaborate consideration and treatment by this Court. The litigation in that case arose under the Tariff law of 1846, and the real question was whether Congress intended that certain articles, and among others, "shawls" should be classified for duty under the phrase "clothing ready made, and wearing "apparel of every description, of whatever material "composed, made up or manufactured, wholly or in "part, by the tailor, seamstress or manufacturer." It will be seen that the language then used by Congress was as comprehensive and all-embracing as it could be made, for the phrase is not merely "clothing ready made "and wearing apparel *of every description*, of whatever "material composed." The words "every description" preclude a denial that there could be a kind of wearing apparel not included within the phrase employed by Congress. There could be, therefore, in that case, no opening for a contention that there existed a description of wearing apparel which Congress had not embraced in the phrase "every description." The question, therefore, involved in *Maillard vs. Lawrence* was very different from the question involved in the case at bar, by as much as the phrase "*every* description" is unlike the phrase "*similar* description." The phrase "clothing ready made and wearing apparel of every description," as employed in the Act of 1846, when applied to shawls, is as comprehensive, and not unlike the phrase "on women and children's dress goods," as used in the fifth section of the tariff law of June 3d, 1864, when applied to delaines, and Saxony woven dress goods. For that reason this Court, in *Maillard vs. Lawrence*, was perfectly correct, when it condemed as absurd and intolerable the effort made by the importer to interpret and pervert "language which is familiar to "all classes and grades and occupation—language the "meaning of which is impressed upon all by the daily "habits and necessities of all." The Court very prop-

erly added that if such language "may be wrested from "its established and popular import with reference to "the common concerns of life, there can be little sta- "bility and safety in the regulations of society. Per- "haps within the compass of the English language, "and certainly within the popular comprehension of the "inhabitants in this country, there can scarcely be "found terms, the import of which is better understood "than is that of words 'shawl' and 'wearing ap- "parel,' or of 'shawl' as a familiar every-day and in- "dispensable part of wearing apparel." And it would "seem to be a most extravagant supposition which could "hold that, in the enactment of a law affecting the in- "terest of the nation at large, the legislature should se- "lect for that purpose language by which the nation or "the mass of the people must necessarily be misled."

In another case, that of *Homer vs. The Collector*, (1 Wallace, 486) which was before this Court in 1863, another very absurd and futile effort was made to apply the commercial rule and test as prescribed by this Court in 1826, to an importation where the rule and test could have, in common sense, no possible application. An effort was made, in that case, to argue that when Congress had said that almonds, *eo nomine*, should pay a specified rate of duty, such duty could be reduced by subsequent legislation which levied a lower rate of duty on "friuts, green, ripe or dried." In the decision of the case this Court said:

"The argument is that almonds are dried fruit, and hence are pro- "vided for in the second section of the Act of 1857; and evidence was "offered on the trial to show that such was the commercial sense of the "term. But this inquiry had nothing to do with the question, and in- "deed it is difficult to see how any such inquiry could take place except "as a matter of curiosity and speculation, for certainly *such proof could* "*not exist, or be found*, in the sense of commercial uses in any of the "tariff acts, as a duty had been imposed on almonds *eo nomine* almost "immemorially, at least since the Duty Act of 1804, and continued in "the Duty Acts of 1816, 1832, 1842 and 1846."

This Court adhered to the rule prescribed in the Almond case when *Reiche vs. Smythe* (13 Wallace, 162), came

before it. In that case it appeared that, in 1861, Congress exempted from duty "birds, singing and other," and in a later act levied a duty of 20 per cent. on "all horses, mules, cattle, sheep, hogs and *other live animals.*" The Attorney-General argued that the phrase "other live animals," in its popular and general sense, must be taken to include "birds," but the Court said No; and for the reason that while it is the duty of the Court to ascertain the meaning of the Legislature from the words used in the statute, in the subject matter to which it relates, there is an equal obligation upon the Court to restrict the popular meaning of words and sentences used in the tariff law, in order to carry out the legislative intention.

In *Arthur vs. Cumming et al.*, (91 U. S. Rep., 362) the question was, whether the phrase "all oil-cloth foundations, or floor cloth canvas" included "burlaps." On the trial the Court permitted mercantile experts to express to the jury their opinion of the commercial meaning of the terms "oil cloth foundations," and of "floor-cloth canvas," as well as of "burlaps;" and also to express their opinion whether the former phrase included the latter. This Court sustained the ruling of the Court below.

"The rule to be followed in the construction of "revenue statutes in cases like these is well settled in "this Court. It is that *the descriptive terms* applied to "articles of commerce shall be understood according to "the acceptation given to them by commercial men in "our ports at the time of the passage of the act in which "they are found."

In the case of *Lottimer et al., vs. Smythe*, (November 14, 1871) reported in 17th Internal Revenue Record, p. 12, and referred to with approbation of this Court, in *Arthur vs. Morrison*, (96 U. S. Rep., 110) the rule and test to be employed in the interpretation of tariff laws was elaborately considered by Judge Woodruff in his charge to the jury. The question was whether the phrase, "All piece silks," as used in the law of 1864, in-

cluded a fabric entered at the Custom House and commercially known as "silk crape." It was conceded by both sides that the term "piece silks" was, in 1864, not in commercial use as a technical designation of any silks whatever, and that the silk crape was made of silk, and was imported in the piece. Judge Woodruff instructed the jury that the phrase "all piece silks" was intended by Congress, in 1864, to include all *silk* goods made and imported in the piece, and included crape, unless in trade and commerce, among men concerned in the business of importing and dealing in crape, the term "silk crape" was not, in 1864, known as "silks." He charged the jury that if the goods in question were not, in commercial language, known, in 1864, as "silks" the plaintiff should recover. In the course of his charge, Judge Woodruff said:

"The statute uses these terms in their commercial sense. *Statutes* "*regulating duties on imports* are intended to regulate and control or "affect trade and commerce, and are addressed not merely to the reve- "nue officers, but to merchants and dealers, whose interest and whose "business are to be affected by these laws—those who import and deal "in the subjects upon which the duties are imposed, and therefore *the* "*descriptive terms* employed in such statutes are to be taken according "to their known signification in trade and commerce. * * * "When general terms are used, the terms are to be taken and applied "in their ordinary and comprehensive meaning, unless it is shown that "they have, in their commercial use, acquired a special meaning."

In the case of *Arthur vs. Morrison* (96 U. S. Rep., 108) the same law was under consideration as in *Lottimer vs. Smythe*, and a similar question, arising under that law, came before this Court. The inquiry was whether the term "silk veils," in the tariff law of 1864, included "crape veils," the crape veils being manufactured entirely of silk. The Government argued, as the Treasury Department argues in the case at bar, that the term "silk veils" should be interpreted in its popular sense, which is comprehensive enough, as understood by the community in general, to include all veils made of silk. In reply to this contention of the Government this Court said:

"If this were all, the argument would be a strong one. But the fact "that the veils in question are universally known and recognized among "merchants and importers as crape veils, and not otherwise, and are "never called or known as silk veils, is to be taken into account. "* * * *Especially should this view prevail as to laws made for "the government of the importer.* His business is regulated by them; "and it is but reasonable that, like the language of marine policies, and "the terms of the law merchant supposed to be especially applicable to "this class, *these laws should be construed as universally understood by "the importer and trader.* * * * In the present case, it is "admitted by the demurrer that the goods in question are never under- "stood by the merchant and importer to be silk veils. They cannot, "therefore, be considered as veils within the enumerating clause of the "statute, but come under the head of such as are not otherwise pro- "vided for, and as subject to the duty of 50 per cent. only."

In a series of Collectors' cases, decided at the October Term of this Court for 1877, and reported in 96th U. S. Reports, this Court inflexibly maintained, against the earnest and reiterated contention of the Treasury Department, that a phrase in the tariff law, even about the meaning of which in its general and popular sense, there can be no doubt, is not to be interpreted and applied in that general and popular sense, if the law-making power has clearly indicated, by previous or contemporaneous legislation on the same subject, that the phrase is to be understood in the limited and restricted sense. This series of decisions were put upon the ground that the law-making power, and the judicial power, had clearly manifested the sense in which the Treasury Department, in executing the law, should apply the word used. This Court seems to have distinctly said in those cases, that Congress, in tariff legislation, is to be understood to use the vocabulary, and speak in the terms of trade and commerce, rather than in the vocabulary and in the terms of the general community, whenever it shall appear that there is a difference between the vocabulary and the terms of mercantile men and of the general community.

In *Fisk vs. Arthur* (103 U. S. Report, 431) this Court again distinctly intimates as much when it says:

"It is not pretended that the new article had acquired

"any distinctive name *in commerce*, or that it was, in any "material respect, different from similar goods manufac- "tured entirely from cotton."

To the same effect is this expression of the Court in *Swan vs. Arthur* (103 U. S. Report, 597 :

"While tariff acts are generally to be construed "according to the commercial understanding of the "term employed, language will be presumed to have "the same meaning in commerce that it has in ordinary "use, *unless the contrary be shown*."

Again, in *Vietor vs. Arthur* (104 U. S. Report, 498) this Court said :

"It is also well settled, that when Congress has desig- "nated an article by a specific name, and imposed a "duty on it by such name, general terms, in a later or "in other parts of the same act, although sufficiently "broad to comprehend such article, are not applicable "to it."

After this thorough and pains-taking, but, it is to be feared, somewhat tedious examination and presentation of what has been said by this Court during the last sixty years, in respect to the interpretation of tariff laws, we are prepared to inquire intelligently whether or not Congress intended that the phrase "goods of similar description" should be so interpreted, in a commercial sense, as to prevent the importer from producing evidence before the jury tending to show in what sense the phase was used and understood by competent commercial experts at the time of the enactment of the law in question.

The transcript of the record, in the case at bar, shows (on page 10, folios 30 and 31) that "the plaintiff called "a number of merchants by whom they offered to prove "that in trade among merchants, importers, wholesale "dealers and jobbers, Saxony woven dress goods, like "the plaintiff's, in 1861 and 1862, and prior thereto, were "not commercially known or considered as goods of "similar description to delaines, cashmere delaines, "mousseline delaines, or berege delaines." And that to

the introduction of this evidence the defendant's counsel objected, on the ground that the word "similar description," contained in the ninth section of the Act of 1862, are to be taken and understood in their general sense in the community at large; and that the words are not used in a restrictive or commercial sense.

The Record goes on to say: "The Court sustained the objection and excluded the evidence," and that "to this ruling the plaintiff's counsel then and there duly excepted, which exception was duly noted and allowed by the Court" (fols. 30–'1).

It also appears by the record that the testimony of several witnesses called by the plaintiffs to give their opinion as to whether or not the fabric in controversy was "of a similar description" to specified delaines, was excluded by this Court, not on account of any objection to the *form* of the question, but upon the ground, that the opinions of mercantile men were not admissible to show whether the fabric in controversy were "*similar*." No objection appears to have been made by the defendant's counsel to the competency of the witnesses called as commercial experts, but the objection was put solely upon the ground that such opinions were not relevant, in a legal sense, to the issue on trial. The error, therefore, as assigned by the plaintiffs, is that the judge who presided in the Court below, at the trial of the case, refused to allow the jury to hear and consider the opinions of well known and expert merchants, importers and dealers, who were familiar with the character, quality and trade nomenclature of the articles in controversy which were to be compared with one another. The plaintiff's contention is that the jury should have been permitted to consider and weigh that expert testimony in connection with all other pertinent and relevant testimon respecting similarity. The opinion of the community generally—lawyers, physicians, clergymen, seamstresses and sewing women—should not, in the opinion of the plaintiffs, exclude and preclude the opinion of competent merchants, importers, and wholesale dealers

in Saxony dress goods and also in delaines, who, in 1862, daily bought and sold the goods in controversy, wrote letters about them, made invoices of them, and, generally carried on the wholesale trade, in them. In *Greenleaf vs. Goodrich*, such expert testimony was, as we have seen, *not offered*. In the case at bar it was offered, and was excluded. That exclusion was a manifest error. The language employed by this Court in the decision in the case of *Greenleaf vs. Goodrich* certainly warrants the inference, that if such expert testimony had been offered on the trial of that case, and had been excluded by the judge, this Court would have pronounced the exclusion to have been an error.

The plaintiffs in the present case contend that in a general sense all the language used in the tariff laws to classify and define the articles upon which rates of duty are to be levied, as well as the rates of duty themselves, is commercial language. In *Two Hundred Chests of Tea*, the Court say that duty laws "class substances according to the general usages and known denominations of trade. Was not the phrase "of similar description" used in order to class substances for the purposes of duty? In *Barlow vs. The United States*, the Court say that in tariff laws "Congress must be presumed to use "the words in their known and habitual commercial "sense * * * * in our own trade, foreign and do- "mestic, as used among buyers and sellers and general- "ly in the course of trade and business." Had not the "importers of the country a right to suppose that Con- "gress employed the phrase 'goods of similar descrip- "tion' in that commercial sense?"

In *The United States vs.* 112 *Casks of Sugar*, the Court say:

"*All laws* regulating the payment of duties are for "practical application and commercial operations, and "are to be understood in a commercial sense."

As the phrase "goods of similar description" is found in a law regulating the payment of duties, why should these importers be injured in their property by a denial

on the part of the Treasurer, that the phrase was used in the law of 1862 in any other than a commercial sense; and how can that commercial sense be ascertained if the jury are not to be permitted to hear from commercial men how they interpreted the phrase at the time of enactment in question.

In *Elliott vs. Swarthout* the Court again say:

"Laws imposing duties upon importations of goods are intended for practical use and application by men engaged in commerce."

To be sure that language was then applied to the *denomination* of articles rather than to a phrase like the one now under consideration; but is there really any substantial difference between that term of denomination and the phrase to which reference is now made. Why should this Court decide that there was a difference? What interest to the Government, or of the Treasury Department, or of importers, or of taxpayers, demands of the making of such difference?

In *Maillard v. Lawrence*, the Court did not decide whether such expert testimony as the plaintiffs' offered in *Schmieder's* case would be admissible, but said it was impossible and against the sense of everybody, that there could be a commercial definition of the word "shawl" different from the general, universal and popular definition.

There was one or two expressions casually uttered by the Court in announcing its decision of *Greenleaf v. Goodrich*, which the defendant in the present case may mention as justifying the exclusion, on the trial, of the expert testimony which the plaintiff contends ought not to have been excluded. Those expressions are these:

"Reliance is placed upon the rule which we admit to "be established, that commercial designation of an "article among traders and importers, where such desig- "nations are clearly established, fixes its character for "the purpose of the tariff laws. But the present is not "a case of the commercial designation of articles. The "phrase "of similar description" is not a commercial

"term, and, if it were, there is no evidence in the record "to show what it is understood to mean among mer- "chants and importers."

It may be fairly said that those sentences are *obiter dicta*. They were not necessary to the decision of the case, or to the explanation and setting forth of the reasons of the decision. The real question in *Greenleaf v. Goodrich* was whether the delaines, with which the plaintiff's goods were to be compared were to be colored delaines or uncolored delaines—woven in the grey or woven in colors—and the Court decided that the delaines to be used in comparison, might, under the law of 1862, be either colored or uncolored. Therefore, upon the record, as presented in *Greenleaf v. Goodrich*, there was no ground of error.

Even if this Court shall, on a reconsideration of the question, say that the phrase "of similar description" is not a commercial term, but it is a term familiar to "*all* classes, grades and occupations," and, therefore, that the popular or received import of such words furnishes the general rule for its interpretation, even then, it will not necessarily follow, as a logical inference, that the jury cannot be permitted to hear evidence of what tends to show whether or not, in the opinion of commercial men, the plaintiff's fabric was, in 1862, "of similar description" with the specified delaines. How can it be said that a definition of the phrase "goods of similar description" and the result of a comparison between the fabrics in question, are *universally* received and accepted by "*all* classes, grades and occupations," if one great class in the country, to wit, importers and wholesale dealers, do not thus interpret the phrase, and do not acquiesce in the result of such an inquiry made in respect to similarity. We have seen that the accepted theory of the Supreme Court, and of the Government of half a century, has been that tariff laws are especially made for, and especially addressed to mercantile men; but are those mercantile men now to be told that their

opinions are not to be received, or considered by juries in determining rates of duty?

The Secretary of the Treasury, in his decision of March, 1863, heretofore cited in this brief, refers to the opinions of experts in the several Custom Houses, in respect to the similarity of these fabrics. If the opinions of these *official* experts can be received and acted upon by the executive department of the Government, why shall the opinions of these same officials, as well as the *unofficial* experts of the country, who are importers and dealers, not be received by the judicial power of the Government, when the question finally comes before the judicial power for decision? What harm or injury can be inflicted upon the Government by permitting juries to receive the opinions of importers and business men, who carry on and manage the importations into the United States, out of which so large a portion of the public revenue is derived? Cannot their intelligence, and their integrity be relied upon by the judicial power? It is not necessary for the plaintiffs to claim that the opinion and the testimony of manufacturer, retail dealers, seamstresses, and shop girls offered by the defendant, shall be excluded in the comparison between "Saxony dress goods" and "delaines," but it is insisted that the triers shall be permitted to hear what the great importers of the country, who enter these fabrics at the Custom House, and who sell the fabrics to the retail dealers and consumers, shall also be heard. It will not be denied by the defendant, that, from the day when the Act of July 14, 1862, went into operation, up to March, 1863, the New York appraisers, although often requested by our domestic manufacturers, refused to return these Saxony dress goods as "similar" to delaines, and liable to the square yard duty; that the Collector of the Port of New York permitted these Saxony dress goods to be, up to March, 1863, withdrawn from the New York Custom House on paying 35 per cent. *ad valorem*, and that, during all that time, from July, 1862, to March, 1863, the Secretary of the Treasury accepted the return of classi-

fication made by the appraisers of New York, and the decision of the collector of New York thereon, as correct and true.

The plaintiffs repeat, that the only fact in issue on the trial was the similarity or dissimilarity of the finished and completed product. The Court refused to allow the official experts of the Government and the commercial experts, offered by the plaintiffs, to be heard by the jury on that main issue of fact. Why? The Treasury Department informed the plaintiffs, by its circular of March 20, 1863, that "the experts of the customs" had been directed to inquire and report, and did inquire and report on that issue of similarity or dissimilarity. On their report the Treasury declared that it decided that *all* goods (1) composed of the same materials, and (2) used for the same purpose as a delaine, must be treated as of "similar description." The similarity of materials and of use was made the only test. All other inquiry about similarity was to be excluded by the appraisers. No notice could be taken of dissimilarity of mode of manufacture, weight, feeling, touch or appearance. If the component materials and the use were similar, the inquiry must be stopped, no matter what dissimilarities existed. The declaration and opinion by the Treasury Department was put in evidence by the defendant, but the opinion of the customs' experts, on which the Treasury relied, the jury were not permitted to hear. That was a manifest error!

More than that! The record shows, on page nine, that the defendant was allowed to produce evidence tending to show, and necessarily by *opinions*, that the plaintiffs goods were made of the *same* materials, used for the *same* purposes, brought into trade at the *same* time, and sold at the *same* prices. Also, that they were *similar* in appearance, patterns and style; *similar* in weight; *similar* in texture, and that "the only dissimilarity consisted in the "mode of applying the colors." The defendant was thus provided to display opinions before the jury in great abundance respecting the several elements of "similarity." Why, then, and for

what reason in law, or justice, or fair play, were the plaintiffs prevented from laying before the jury opinions respecting the commercial or other "similarity" of the finished product? The plaintiff's witnesses were not offered to testify so much about the meaning of the phrase, as to say whether or not, in trade, the two fabrics to be compared were, in 1862, treated as "similar" goods. It may be said that the plaintiff's experts were asked to testify as to the main and only fact in issue but even then, why should they not have been permitted to answer? If the fact in issue had been whether or not, for purposes of duty, the fabric was a "delaine," that opinion would have been a relevant and an admissible opinion. The question, in the case at bar, was whether or not the fabric was, in 1862, "*similar*" to a delaine? In both cases the inquiry would be as to denomination and classfication for duty. To say that the phrase "similar to delaine" is one of description, cannot, in revenue law, change the law of evidence. "Similar," in that relation, is as much a commercial term as is "refined," when applied to sugar for tariff purposes.

If the defendant shall contend on the argument that the phrase "of similar description" is a descriptive phrase in a tariff sense, that contention cannot aid him, for this Court has declared, in *Arthur* v. *Cumming*, that "descriptive terms" shall be understood according to the acceptation given to them by commercial men.

This Court has said that words of "denomination," such words of "description" in American tariff laws, are addressed to, and are to be interpreted by, mercantile men, "only not words of comparison, resemblance, and similarity." In the fourteenth edition of *Greenleaf on Evidence* (Vol. 1, p. 535), a rule and test, drawn from an elaborate consideration of judicial authorities are thus defined:

"Opinions, like other testimony, are competent in the "class of cases in which they are the best testimony; "as where a mere description, *without an opinion*, would "generally convey a very imperfect idea of the force' "meaning and inherent character of the things described."

Is not that especially true when the question is whether two classes of goods are "*similar*," in the sense of buying in a foreign country, importation into our own country, dealing in such goods in the principal markets of our own country, or manufacturing and selling them in our own country:

The Court, in its charge, (page 17), told the jury that the three elements of "similarity" to be considered by them were (1) general appearance; (2) character; and (3) texture. On each of these three the defendant was permitted to offer the opinions of his witnesses, but the opinions of Government experts and commercial experts offered by the plaintiff's, respecting the "completed products," were excluded, on the theory (see folio 30 of record) that the word "similar" was to be interpreted in its "*popular* sense," and that opinions as to its *commercial* sense could not be relevant to an inquiry concerning such popular sense.

It cannot be believed—at least not by sensible men—that if all the importers and wholesale dealers in Boston, New York, Philadelphia and Baltimore, experienced in the goods in controversy and to be compared, did not in 1862, classify and treat the two classes of goods as "similar" goods, that Congress intended so to classify and consider them.

The Court has decided in *Arthur vs. Unkart* (96 U. S. Rep. 118) that, in Collector's suits, the burden is on the importer, to show the illegality complained of by a fairly preponderating and tipping weight of testimony to be put in the scales. If, for example, no samples of the fabrics can be procured to be laid before a jury, how is the similarity to be tried without the productions of opinions to be put in the scales? And if any opinions are to be admitted, why shall the opinions of commercial experts be excluded!

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Of Counsel for Plff's.

113-645

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

SCHMIEDER
v.
BARNEY, COLLECTOR. } No. 109.

BRIEF FOR THE DEFENDANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

SCHMIEDER
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BRIEF FOR THE DEFENDANT.

The question presented in this case is as to the evidence by which the *similarity* between goods spoken of in the act of 1862, ch. 163, sec. 9 (July 14, 12 Stat., 553), is to be ascertained; that is, whether by the testimony of persons who speak as to the understanding in special trades, &c., or as experts, or as an ordinary question of fact.

Upon the trial twelve different exceptions were noted. In this court, however, those relied upon by the plaintiff in error are only four (Brief, pp. 7, 8).

The purpose seems to be to obtain a change of the ruling in Greenleaf *v.* Goodville, 101 U. S., p. 278. For, as is now submitted, the distinctions drawn by the learned counsel for the plaintiff in error betwixt the principles of law laid down as premises in that case (following therein the argument in Maillard *v.* Lawrence, 16 How.) and the

rule of administration followed in this case by his honor below do not go to the *substance*.

If the phrase "of similar description" be not a commercial term, then there is no reason for introducing here the evidence of experts in *commercial* (any more than in *legal*) phraseology. An *expert* has no function to discharge unless there be question in regard to some appropriate *art or mystery* that needs elucidation. The present field of operation of experts before juries will hardly be enlarged.

Nor is it proper in the course of inquiry *in chief* (however it might be on cross-examination), as to the acceptation and application of terms by the community in general, to ask how they are received in some particular calling, *under a suggestion that such calling is a part of the general community*. That may be; but the technical use of a word in such calling is not any part of the general use thereof. A merchant, when talking with another merchant, may use a term correctly in a very different way to that in which, *just as correctly*, he will out of business hours, or away from trade.

To apply these suggestions to the assignments in error (Brief, p. 7):

1. If "*of similar description* is not a commercial term" (101 U. S., p. 284), then it was improper to call a number of merchants to prove that *in trade among merchants* "the goods in question" were not *commercially known* as goods "of similar description to delaines," &c. It would have been quite as pertinent to ask a military officer what is its *military* usage or applicability.

2. The proposed evidence of Mr. Hogeboom is liable to the same remark, and also to the objection of *res inter alios*.

3. Here Mr. Hogeboom, by saying that he was an *expert*, places his evidence in the category of the *merchants* in the first assignment.

4. There is no estoppel in the circumstance that the defendant as collector had previously in these cases held different views upon this matter of *similarity*. The United States have a right of "continual claim" upon all officers who hold posts in which discretion is exercised to correct such discretion from time to time until it becomes perfect. There is obviously no such official duty as that of consistency *in error*, whether harmful to the Government or to citizens.

S. F. PHILLIPS,
Solicitor-General.